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Preserving the Military Commissions Act

Ensuring Lawful Detention of Enemy Combatants Without Creating New Habeas Corpus Rights

Executive Summary

- Although Congress debated and rejected proposals to afford alien enemy combatants habeas rights on three separate occasions during the 109th Congress, two bills were introduced to lay the groundwork for creating those rights in the 110th Congress.
- As a federal district judge held just this month, nothing in the U.S. Constitution requires that habeas rights be granted to alien unlawful enemy combatants detained by the United States during a time of war.
- As the Supreme Court noted in its World War II era *Eisentrager v. Johnson* decision, granting habeas rights to enemy combatants would “hamper the war effort and bring aid and comfort to the enemy.”
- In *Hamdi v. Rumsfeld*, the Supreme Court affirmed the authority of the United States to hold enemy combatants “until the end of hostilities,” so long as U.S. citizen detainees are provided a process to review that designation. The Executive, however, has chosen to extend that process to *all* detainees, regardless of citizenship.
- Each enemy combatant in U.S. custody is given five layers of review to ensure that his detention is lawful. This process serves the purpose of habeas review and negates any purported need to create constitutional habeas rights for alien unlawful enemy combatants.
- The extensive review process provided by the United States is unprecedented. Not even during World War II, when the United States captured and held more than two million enemy combatants, 425,000 of which were detained on U.S. soil, were alien prisoners permitted to petition for habeas relief.
- It would be premature for Congress to declare this process inadequate and create habeas rights for alien enemy combatants. Doing so would unnecessarily create a litigation crisis and overwhelm federal courts with countless petitions regarding detention and treatment.

Introduction

On November 1, 2006, just two weeks after President Bush signed the Military Commissions Act (MCA) into law, attorneys for detainees held at Guantanamo Bay challenged as unconstitutional the provisions of the MCA that denied federal courts jurisdiction to hear habeas corpus petitions filed by alien enemy combatants detained by the United States. A federal district judge just ruled that these lawsuits are without foundation, as nothing in the U.S. Constitution requires habeas rights for enemy combatants. The court held that the MCA effectively removed federal courts' jurisdiction over habeas petitions filed by detainees and that alien enemy combatants have "no constitutional entitlement to habeas corpus."¹

Allowing enemy prisoners to petition for habeas relief would open the floodgates to detainee litigation and hamper this nation's efforts to combat terrorism. Indeed, the Senate has contemplated and rejected proposals to afford detainees habeas rights on three separate occasions.² It is the purpose of this paper to examine the policy implications of the legislation and the court decision upholding it.

Background to Terrorist Legislation

Current detainee policy is a product of the ongoing struggle between consistent congressional efforts to limit the access of detained alien enemy combatants to U.S. courts and steady resistance from lawyers who seek to litigate every aspect of detention and treatment. To understand this struggle, one must understand three significant Supreme Court decisions and two major pieces of legislation that have shaped U.S. detainee policy.

Hamdi v. Rumsfeld—U.S. Power to Detain Enemy Combatants Without Prosecution

In its 2004 *Hamdi v. Rumsfeld* decision, the Supreme Court affirmed the authority of the United States to detain enemy combatants without trial "until the end of hostilities,"³ so long as U.S. citizens detained as enemy combatants have a process to challenge that designation.⁴ In response to *Hamdi*, the Executive created multiple layers of review to ensure warranted and lawful detention of each detainee, regardless of citizenship,⁵ in addition to the military commissions it had already established to bring to justice certain detainees who could be prosecuted for war crimes.⁶

¹ *Hamdan v. Rumsfeld*, No. 04-1519, slip op. at 22 (D.D.C. Dec. 13, 2006).

² Vote to adopt the initial Graham amendment barring detainees from filing habeas corpus petitions (amendment agreed to 49-42, Roll Call Vote No. 319, Nov. 10 2005); vote to defeat the Bingaman amendment allowing detainees to file habeas petitions, but only in the U.S. Court of Appeals for the D.C. Circuit (amendment rejected 44-54, Roll Call Vote No. 324, Nov. 15, 2005); vote to defeat the Specter amendment striking habeas provisions of the Military Commissions Act (amendment rejected 48-51, Roll Call Vote No. 255, Sept. 28, 2006).

³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

⁴ *Hamdi*, 542 U.S. at 537.

⁵ Prepared Remarks by Attorney General Alberto R. Gonzales at the International Institute for Strategic Studies, London, England, March 7, 2006, available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_060307.html (hereinafter "Gonzales 3/7/06 Remarks").

⁶ Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

Rasul v. Bush—Enemy Combatants’ Right to Challenge Detention in Federal Court

In 2004, the Court also decided *Rasul v. Bush*, in which it interpreted the federal habeas statute as applying to alien enemy combatants detained at Guantanamo Bay. As a result, the decision allowed detainees to petition U.S. courts with grievances about their confinement and treatment. The Court’s holding, however, was solely a function of statutory interpretation; it did *not* hold that alien enemy combatants detained on foreign soil have a *constitutional* right to petition U.S. courts for habeas relief. Therefore, although the *Rasul* decision gave these suspected foreign terrorists access to federal courts, it *did not* inhibit the ability of Congress to statutorily limit that access.

Detainee Treatment Act—Limiting Enemy Combatants’ Right to Habeas Corpus

After the *Rasul* decision, Congress chose to amend the habeas statute by passing the Detainee Treatment Act (DTA). The DTA expressly precluded unlawful enemy combatants from filing for habeas relief. Instead, the DTA granted detainees facing adverse judgments in either a military commission or a combatant status review tribunal (CSRT) a single right of appeal to the U.S. Court of Appeals for the D.C. Circuit.⁷

Hamdan v. Rumsfeld—Invalidating Congressional Efforts to Limit Habeas Rights

The Supreme Court invalidated Congress’s attempt to preclude detainees from petitioning federal courts for habeas relief by finding, in *Hamdan v. Rumsfeld*, that Congress had failed to articulate clearly the application of the DTA to *pending* (versus future) claims. In other words, *Hamdan* reinstated the statutory right of detained enemy combatants to have their *pending* habeas petitions heard in federal court.

Military Commissions Act—Limiting Detainees’ Habeas Rights “Without Exception”

After *Hamdan*, Congress quickly moved to address the statutory issue. In order to ensure that the several hundred pending lawsuits filed by enemy-combatant detainees were governed by the DTA (and not the older habeas statute), Congress included in the Military Commissions Act language to more explicitly apply the DTA to pending cases. Thus, the DTA, as amended by the MCA, eliminates federal court jurisdiction over two categories of cases: (1) “application[s] for a writ of habeas corpus” and (2) “*any other action*” that relates “to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of aliens determined to have been properly detained as enemy combatants.⁸ Further, the Act specifies that the DTA “shall apply to all cases, *without exception*, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”⁹ It is this portion of the MCA that detainees attacked as unconstitutional.¹⁰

⁷ Detainee Treatment Act of 2005, Pub. L. 109-148, Div. A, Tit. X, 119 Stat. 2739.

⁸ 28 U.S.C. § 2241(e).

⁹ Military Commissions Act of 2006, Pub. L. 109-336 § 7(b) (hereinafter “Military Commissions Act” or “MCA”).

¹⁰ Petitioner detainees also argue that the Military Commissions Act suffers from the same deficiency as did the Detainee Treatment Act in that its plain language fails to strip jurisdiction over pending habeas cases. Pet’r Supplemental Br., 3-6. That argument is not addressed in this paper.

Alien Enemy Combatants Have No Constitutional Right to Habeas Corpus

“Habeas corpus” is a writ employed to bring a person before a court to determine whether his detention is legal.¹¹ The U.S. Constitution provides: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”¹² While habeas corpus cannot be suspended except in limited circumstances, there is no constitutional requirement that it ever *apply* to non-citizen enemy combatants.

Congress has conferred on the federal courts jurisdiction to hear petitions for habeas corpus. That jurisdictional grant, codified at 28 U.S.C. § 2241, is subject, within constitutional bounds, to amendment by Congress. As has long been recognized, “Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.”¹³

Congress should have no qualms about the constitutionality of its refusal to extend habeas corpus rights to unlawful enemy combatants. Courts have held that U.S. constitutional protections do not apply to aliens detained outside of the United States.¹⁴ Even for aliens detained within the United States, the Supreme Court has set a high bar for attainment of the unique constitutional privileges enjoyed by American citizens. Concluding that aliens only avail themselves of such privileges “when they have come within the territory of the United States and developed *substantial connections* with this country,” the Supreme Court noted in *United States v. Verdugo-Urquidez* that “lawful but involuntary” presence in the country does not constitute that kind of substantial connection that is required to receive constitutional protections.¹⁵

Precedent speaks even more clearly with respect to the rule that alien enemy combatants have no constitutional right to habeas corpus. As early as 1793, courts recognized that foreign prisoners held by the military during armed conflict have no inherent right to judicial review of their detention.¹⁶ The Supreme Court reaffirmed that view in its 1950 *Johnson v. Eisentrager* decision denying habeas rights to German nationals who had been convicted by military commissions and held by the U.S. Army in Germany.¹⁷ The Court rejected the argument that enemy combatants detained overseas have a right to petition U.S. courts for habeas relief, noting that “nothing in the text of our Constitution extends such a right”¹⁸ and that “no decision of this Court supports such a view.”¹⁹

¹¹ BLACK’S LAW DICTIONARY 638 (7th ed. 1999).

¹² U.S. Const., Art. I, § 9, cl. 2.

¹³ *Rasul v. Bush*, 542 U.S. 466, 489 (citation omitted).

¹⁴ See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (Fourth Amendment inapplicable to searches of alien property abroad); *Cuban Am. Bar Ass’n. v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) (First Amendment inapplicable to aliens at Guantanamo Bay); *32 County Sovereignty Comm. V. Dep’t of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (“[A] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.”) (emphasis added) (citation omitted).

¹⁵ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260, 271 (1990) (emphasis added).

¹⁶ Courts “will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty.” *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793).

¹⁷ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

¹⁸ *Eisentrager*, 339 U.S. at 767.

¹⁹ *Eisentrager*, 339 U.S. at 784.

Despite the Court's clear declaration in *Eisentrager* that habeas corpus rights do not extend to alien enemy combatants detained outside of the United States, some argue that the Court has since recognized such a right. Proponents of this view often cite one sentence of Justice Sandra Day O'Connor's plurality opinion in *Hamdi v. Rumsfeld*, which said: "all agree that, absent suspension, habeas corpus remains available to every individual within the United States."²⁰ Reliance on that statement, which was *not* central to the holding of *Hamdi*, is inapt.

The question in *Hamdi* was whether the Executive had the authority to detain a U.S. citizen as an enemy combatant and whether that citizen-detainee had habeas rights. Focusing on that narrow issue, the plurality referred specifically to the rights of *citizens* eight times in its opinion, and the *holding* of the case is limited (as are all holdings) to the circumstances of the cases itself. (Hamdi was, after all, a U.S. citizen.) Regardless, some advocates maintain that Justice O'Connor's otherwise inconsequential statement (too tenuous to constitute dicta) reversed years of settled precedent and, for the first time, granted habeas rights to alien enemy combatants detained overseas.

That proposition flies in the face of the common sense interpretive rule that one does not "hide elephants in mouseholes."²¹ Had the *Hamdi* court intended to extend habeas rights to all individuals in the United States—including suspected foreign terrorists detained outside of U.S. sovereign territory—it most assuredly would have articulated such a consequential ruling with more clarity. But *Hamdi* did not present that question, and the Court did not resolve it. Moreover, as the Court aptly noted in *Eisentrager*, "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment."²² Accordingly, had such a consequential holding been made in *Eisentrager*, it would have been met with prolific commentary from the legal community, an event that simply never occurred. As evidenced by the lack of contemporary discussion, no decision subsequent to *Eisentrager* has reversed its holding that alien enemy combatants have no right to habeas protections guaranteed by the U.S. Constitution; therefore, its holding remains governing law.

Moreover, the issue has now been definitively resolved by the same judge who earlier granted Salim Ahmed Hamdan's habeas petition. Judge James Robertson, of the U.S. District Court for the District of Columbia, issued an opinion on December 13th in which he relied, in large part, on *Eisentrager* to justify his ruling that alien enemy combatants have no constitutional right to habeas corpus.²³ In that case, Judge Robertson, appointed to the bench by President Bill Clinton, dismissed Hamdan's petition for habeas relief on the grounds that the MCA effectively denied his court's jurisdiction to hear the case. Recognizing that Congress had removed Hamdan's *statutory* right to petition the D.C. Circuit for habeas relief, Judge Robertson also held that "[H]amdan's connection to the United States lacks the geographical and volitional predicates necessary to claim a *constitutional* right to habeas corpus."²⁴

²⁰ *Hamdi*, 542 U.S. at 525.

²¹ *Whitman v. Amer. Trucking Assoc.*, 531 U.S. 457, 468 (2001).

²² *Eisentrager*, 339 U.S. at 785.

²³ "It is the *Eisentrager* case that appears to provide the controlling authority on the availability of constitutional habeas to enemy aliens." *Hamdan*, slip op. at 19.

²⁴ *Hamdan*, slip op. at 20.

It is unlikely that the Supreme Court will reverse itself or lower courts and create a new habeas right. Even Judge Robertson, a Democrat appointee, recognized that non-citizen enemy combatants have no inherent right to habeas corpus. As the next section of this paper will show, it would be unwise for Congress to create such a right by statute.

Efforts to Create Habeas Rights for Enemy Combatants are Unwise

Although Congress debated and rejected proposals to afford alien enemy combatants habeas rights on three separate occasions during the 109th Congress, two bills were introduced to lay the groundwork for creating those rights in the 110th Congress.²⁵ Such efforts to reverse longstanding and recently reaffirmed policy are neither wise nor warranted by the current conflict.

Alien Enemy Combatants Already Have Unprecedented Rights to Review

While enemy combatants are not afforded the “privilege of the writ of habeas corpus,”²⁶ they still receive extensive process that fulfills the core purpose of habeas review. Such process affords alien detainees numerous opportunities to contest their designation as enemy combatants. Each detainee is provided an initial assessment by commanders in the field, a formal hearing before a combatant status review tribunal (CSRT), an appeal to the D.C. Circuit and thereafter to the U.S. Supreme Court, in addition to an annual administrative review to determine whether he should be released.²⁷ Because this system ensures the lawful detention of every detainee, the purported need to grant alien enemy combatants constitutional habeas privileges is negated.

The CSRT hearing, afforded to all detainees as a matter of course, is arguably more protective of *unlawful* alien enemy combatants than the protections afforded *lawful* enemy combatants by the Geneva Conventions. Under those treaties, *lawful* alien enemy combatants are only granted “Article 5 hearings” to review their detention in cases where there is doubt of a detainee’s status. Moreover, CSRTs provide *unlawful* combatants the following rights that are absent from Article 5 hearings: a personal representative to provide assistance throughout the hearing, a requirement that the government locate any exculpatory evidence and present it to the panel, and a pre-hearing notice of the unclassified factual basis enemy combatant designations, in addition to an opportunity to testify, call witnesses, and present relevant and reasonably available evidence before the forum.²⁸

The process provided to unlawful alien enemy combatants also exceeds the protections that United States servicemembers can expect in the hands of foreign captors. As was true during World

²⁵ S. 4081, the Habeas Corpus Restoration Act of 2006, was introduced by outgoing Judiciary Committee Chairman Senator Arlen Specter on December 5, 2006 and is cosponsored by incoming Senate Judiciary Committee Chairman, Patrick Leahy. S. 4060, the Effective Terrorists Prosecution Act of 2006, was introduced by Senator Chris Dodd on November 16, 2006, and is also cosponsored by Senator Leahy.

²⁶ U.S. Const., Art. I, § 3, cl. 2.

²⁷ Prepared Remarks by Attorney General Alberto R. Gonzales at the International Institute for Strategic Studies, London, England, March 7, 2006, available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_060307.html (hereinafter “Gonzales 3/7/06 Remarks”).

²⁸ Supplemental Brief of the Federal Parties Addressing the Detainee Treatment Act of 2005 at 7-8, *al Odah v. United States*, D.C. Circuit, Nos. 05-5064, 05-5095 through 05-5116, *Boumediene v. Bush*, D.C. Circuit, Nos. 05-5062, 05-5063 (hereinafter “Gov’t. Br.”).

War II, this country's treatment of alien enemies is "more considerate than that which has prevailed among any of our enemies and some of our allies."²⁹ Reciprocity for our actions, however, is unlikely. As the Supreme Court once asserted, "The right of judicial refuge from military action, which it is proposed to bestow on the enemy, can purchase no equivalent for benefit of our citizen soldiers."³⁰

Creating Habeas Rights Would Be Impractical and Would Hamper War Efforts

It would be a practical impossibility for federal courts to accommodate the caseload associated with providing legal process for detained enemy combatants. During World War II, the United States captured and held more than two million enemy combatants, 425,000 of which were detained inside the United States. None of these alien prisoners were permitted to file habeas petitions challenging their detention.³¹ Indeed, it would have been inconceivable for U.S. courts to entertain habeas petitions from such a large number of war prisoners. The practical difficulties that our courts would face if opened to enemy soldiers were explained by the *Eisentrager* Court as follows:

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence....**Such trials would hamper the war effort and bring aid and comfort to the enemy.**³²

The *Eisentrager* Court's concerns over granting habeas rights to detainees are as valid today as they were in 1950. Today, that list of concerns could be expanded to describe how allowing detainees to simply *petition* for habeas relief also "hamper[s] the war effort and bring[s] aid and comfort to the enemy."³³ As one observer described, "What we are seeing today is...an effort to take the judicial rules and standards applicable in the domestic law enforcement context and extend them to the fighting of wars...[N]othing could be more farcical, or more dangerous."³⁴

To illustrate this point, consider the more than 200 cases that have been filed on behalf of 600 purported detainees.³⁵ Each case represents claims "ranging from speed of Internet access afforded their lawyers to the extent of mail delivered to detainees."³⁶ Despite the frivolous nature of

²⁹ *Eisentrager*, 339 U.S. at 774-75.

³⁰ *Eisentrager*, 339 U.S. at 779 (emphasis added).

³¹ Rear Admiral John Hutson, Ret., Testimony Before the Senate Judiciary Committee, Sept. 25, 2006, available at http://judiciary.senate.gov/testimony.cfm?id=2416&wit_id=5771.

³² *Eisentrager*, 339 U.S. at 779 (emphasis added).

³³ *Eisentrager*, 339 U.S. at 779.

³⁴ The Honorable William P. Barr, former U.S. Attorney General, Testimony Before the Senate Judiciary Committee, June 15, 2005, available at http://judiciary.senate.gov/testimony.cfm?id=1542&wit_id=4362.

³⁵ The actual number of detainees held at Guantanamo Bay does not exceed 500. President George W. Bush's remarks on Sept. 6, 2006, available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>; It is estimated that the actual number of detainees with pending habeas petitions is well over 300. Gov't. Br. at 13.

³⁶ Gov't. Br. at 13.

such filings, authorities in Cuba have been forced to accommodate hundreds of visits by private habeas counsel, “disrupt[ing] the day-to-day operation of the Guantanamo Bay Naval Base.”³⁷

Not only has the habeas litigation interfered with daily operations at Guantanamo Bay, it has “imperiled crucial military operations during a time of war.”³⁸ In a recent brief, the Government describes how habeas counsel have given detainees information that is likely to incite unrest at the naval base. Moreover, interference by counsel has disrupted interrogations that are critical to combating terrorism.³⁹ Counsel for the detainees has publicly boasted:

The litigation is brutal for [the United States.]...Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they’re doing. You can’t run an interrogation...with attorneys. What are they going to do now that we’re getting court orders to get more lawyers down there?⁴⁰

The rush to get habeas petitions before federal judges is not essential to ensuring lawful detention of enemy combatants. In fact, such efforts are likely redundant. As Judge Robertson described in his recent opinion dismissing Hamdan’s habeas petition:

Hamdan is to face a military commission newly designed, because of his efforts, by a Congress...acting according to guidelines laid down by the Supreme Court. **It is difficult to see how continued habeas jurisdiction could make further improvements in his tribunal.**⁴¹

In order to end the current litigation crisis and ensure that our country is able to effectively combat terrorism, it is imperative that Congress not grant new habeas rights to alien enemy combatants.

Conclusion

Congressional efforts to create habeas corpus rights for alien unlawful enemy combatants are constitutionally unnecessary and ill-advised on policy grounds. The Constitution does not require such protections, and the United States has already provided extensive review to ensure the legality of each enemy detention. Combatant Status Review Tribunals have been in place a mere two and half years, and the Military Commissions Act has only been in effect for three short months, yet hundreds of detainees have been transferred or released from Guantanamo Bay.⁴² These landmark protections already serve the purpose of habeas corpus and will prove in time to be an adequate substitute for the writ. Congress should refrain from impulsively disposing of these carefully crafted procedures and, instead, afford them ample opportunity to be tested.

³⁷ Gov’t. Br. at 13.

³⁸ Gov’t. Br. at 13.

³⁹ Gov’t. Br. at 13.

⁴⁰ Gov’t. Br. at 13-14 (quoting detainee lawyer, Michael Ratner).

⁴¹ *Hamdan*, slip op. at 20 (emphasis added).

⁴² Since 2002, approximately 345 detainees have been released or transferred from Guantanamo Bay, including approximately 80 in 2006. Currently, about 110 detainees have been cleared for release or transfer and are awaiting their departure. U.S. Dept. of Defense Press Release, “Detainee Release Announced,” Nov. 17, 2006, *available at* <http://www.globalsecurity.org/military/library/news/2006/11/mil-061117-dod04.htm>.